



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
PITTSBURGH DISTRICT, CORPS OF ENGINEERS
WILLIAM S. MOORHEAD FEDERAL BUILDING
1000 LIBERTY AVENUE
PITTSBURGH, PA 15222-4186

RECEIVED JUN 15 2011

June 14, 2011

Operations Division
Regulatory Branch
1975-66

Kurt Paschl
Beazer East, Inc.
One Oxford Center, Suite 3000
Pittsburgh, Pennsylvania 15219

Dear Mr. Paschl:

I refer to your application, received in this office March 17, 2011, regarding your proposal to dredge 4.7 acres of the Ohio River, at river mile 69.2 to 69.4, left bank, Follansbee, Brooke County, West Virginia.

In March 2011, The United States Environmental Protection Agency (USEPA) issued a Final Decision and Response to Comments document for the cleanup of toxic materials in the Ohio River at this location. In accordance with this document, the project proposes to dredge 4.7 acres of the Ohio River and place a cap composed of three individual layers over the affected area. The first layer will be an absorptive layer of Reactive Core Mat, the second layer will be a sand and gravel filter, and the top layer will be cobble armor to protect the cap. Up to 32,000 cubic yards of material will be excavated and approximately 32,000 cubic yards of capping material will be placed in order to restore the river bottom to its normal elevation and reduce the risk of further pollution.

Activities associated with projects of this type are authorized by Nationwide Permit No. 38 (see enclosure), previously issued by the Corps of Engineers, for purposes of Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act as published in the March 12, 2007 issue of the Federal Register.

Enclosed is a list of conditions which must be followed for the Nationwide Permit to be valid. Adherence to these conditions will permit you to proceed with the proposed project. **Please Note**, the attached Compliance Certification Form must be signed and returned to this office upon completion of the proposed work.

As **SPECIAL CONDITIONS** of this permit:

1. In-water construction will not be conducted when the river stage within the work area is above 645.4 feet above mean sea level based



on NAVD88 vertical datum.

2. Dredging will stop if turbidity, as measured at the downstream compliance location, is either:

- a) 50 NTUs above the upstream background value when the upstream background value is 500 NTUs or less.
- b) 10% above the upstream background value when the upstream background value is greater than 500 NTUs

3. The upstream background value will be established three times per day including early morning, mid-day and mid-afternoon. The early morning background value will be established based on an upstream background measurement taken between 6 AM and 8 AM, the mid-day background value will be based on a measurement taken between 11 AM and 1 PM, and the afternoon background value will be based on a measurement taken between 2 PM and 4 PM. The specific times will be adjusted based on the anticipated duration of the in-water construction activities on a given day. In all cases, the early morning measurement will be collected within 30 minutes of the start of in-water construction activities.

4. The turbidity value at the downstream compliance monitoring location will be calculated using 30-minute rolling average based on data collected with a real-time monitoring device. The calculated 30-minute rolling average will be compared with the upstream background value.

5. The monitoring device at the downstream compliance monitoring location will be placed in the water column where turbidity levels are the highest (either upper, mid-depth or lower). This approach recognizes fluctuating water levels in the river and that goal of the turbidity monitoring is to assess the effects of in-water construction activities and not to measure bed-load transport of sediment that are due to ongoing, natural geomorphological processes that are unrelated to construction activities. Therefore, the monitoring device will never be placed closer than 4 feet from the river bed.

6. The best management practices (BMPs) for this project found in the March 2011 revised report prepared by ARCADIS entitled Supplemental Report: Pre-

Construction Notification and Application for Nationwide Permit #38 Authorization, are hereby incorporated into and made enforceable under this authorization.

7. Except as modified by Special Conditions 2 through 5 above, provisions of the water quality monitoring program, including sampling and criteria for dissolved oxygen (DO), as presented in the Supplemental Report: Pre-Construction Notification and Application for Nationwide Permit #38 Authorization (revised March 2011) are hereby incorporated into and made enforceable under this authorization. In-water work must stop if DO is measured at 5.0 milligrams per liter or less unless the permittee receives occasion specific approval to continue from WV DEP based on background DO levels at the upstream monitoring station and lack of evidence at the downstream monitoring station that on-going work will further suppress DO levels.
8. All work must be in conformance with the 401 Water Quality Certification issued by WVDEP.
9. All in-water dredging and capping work and post-capping monitoring/assessment and any corrective actions affecting the cap must be in conformance with any pertinent conditions of the Final Administrative Order of Consent signed by USEPA and Beazer East, Inc..
10. The Corps of Engineers, USEPA and West Virginia DEP must be allowed full access to the site for random and unannounced compliance monitoring, including independent turbidity monitoring. Each agency has full authority to stop work until any non-compliance or monitoring issues are fully addressed to the satisfaction of the agencies.
11. Work may only commence after appropriate notifications to the United States Coast Guard. The permittee and all sub-contractors must fully comply with all Coast Guard requests and directives regarding traffic management in the navigational channel. Should any unforeseen navigational obstructions or issues be encountered as a result of this project you must immediately notify the United States Coast Guard at (412) 644-5808 and this Corps office at (412) 395-7155.
12. The Permittee must maintain their monitoring logs on-site for inspectors to review. The Permittee must also supply a copy of logs on a weekly basis to the Corps of Engineers (send to George Brkovich, USACE, 1200 Liberty Avenue, Pittsburgh, PA. 15222-4186) and West Virginia DEP (send copies to Tonya Mather, WVDEP, 131 Penninsula Street, Wheeling, WV 26003 and Keith Stuart, WVDEP, 601 57th Street, Charleston, WV 25304)
13. Post-capping monitoring must be in conformance with the finalized Operation, Maintenance and Monitoring (OMM) Plan when approved by USEPA. The Corps of Engineers and WV DEP must be offered the opportunity to comment on all draft OMM Plan Proposals at the time of their submittal to USEPA. The Permittee must provide a copy of that OMM Plan to

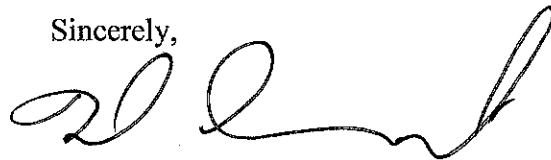
the Corps of Engineers and West Virginia DEP within 30 days of its approval by USEPA. The Corps reserves the right to require corrective actions to assure the integrity of the cap based upon such monitoring.

This verification is valid until the Nationwide Permit is modified, reissued, or revoked. All of the existing Nationwide Permit's are scheduled to be modified, reissued, or revoked prior to March 18, 2012. It is incumbent upon you to remain informed of changes to the Nationwide Permit's. We will issue a public notice when the Nationwide Permit's are reissued. Furthermore, if you commence or are under contract to commence this activity before the date that the relevant nationwide permit is modified or revoked, you will have twelve (12) months from the date of the modification or revocation of the Nationwide Permit to complete the activity under the present terms and conditions of this nationwide permit.

The issuance of this Nationwide Permit will not relieve you of the responsibility to obtain any other required state, local, or Federal authorizations.

If you have any questions, please contact George Brkovich at (412) 395-7247 or email at george.r.brkovich@usace.army.mil.

Sincerely,



Mark Gronceski
Acting Chief, Southern Section
Regulatory Branch

Enclosure

Copy Furnished
Public Lands Corporation
ARCADIS, Mark Hanish
U.S. Coast Guard
USEPA, Andrew Fan
WV DEP, Don Martin
WV DEP, Keith Stuart
WV DEP, Lyle Bennett
WV DEP, Tonya Mather
USACE, Ed Ritsko

Compliance Certification Form

PERMIT NO: 1975-66

NAME OF PERMITTEE: Beazer East, Inc., Kurt Paschl

DATE OF ISSUANCE: 14 June 2011

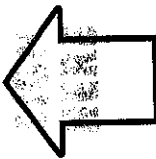
Upon completion of the activity authorized by this permit and any mitigation required by the permit, sign this certification and return it to the following address:

U.S. Army Corps of Engineers
Pittsburgh District
Regulatory Branch, Room 2200
William S. Moorhead Federal Building
1000 Liberty Avenue
Pittsburgh, PA 15222-4186

Please note that your permitted activity is subject to compliance inspection by a U.S. Army Corps of Engineers Representative. If you fail to comply with this permit, you are subject to permit suspension, modification, or revocation.

I hereby certify that the work authorized by the above referenced permit has been completed in accordance with the terms and conditions of the said permit, and required mitigation was completed in accordance with the permit conditions.

Signature of Permittee



NATIONWIDE PERMITS FOR THE STATE OF WEST VIRGINIA

NWP 38

38. Cleanup of Hazardous and Toxic Waste. Specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority. Court ordered remedial action plans or related settlements are also authorized by this NWP. This NWP does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) **(Sections 10 and 404)**

Note: Activities undertaken entirely on a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act.

For activities involving a discharge, the West Virginia 401 Water Quality Certification Standard Conditions apply.

West Virginia 401 Water Quality Certification Special Conditions:

- A. The permittee must provide a notice of the proposed activity to the West Virginia Department of Environmental Protection, Division of Water and Waste Management, Hazardous Waste Program, 601 57th Street, Charleston, West Virginia 25304, as early as possible.
- B. Certification of discharges into island backchannels, embayments, stream mouths, and wetlands is denied.

C. NATIONWIDE PERMIT GENERAL CONDITIONS

Note: To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as appropriate, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP.

1. **Navigation.** (a) No activity may cause more than a minimal adverse effect on navigation.
(b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

2. **Aquatic Life Movements.** No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. Culverts placed in streams must be installed to maintain low flow conditions.

3. **Spawning Areas.** Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

4. **Migratory Bird Breeding Areas.** Activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

5. **Shellfish Beds.** No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWP 4 and 48.

6. **Suitable Material.** No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).

7. **Water Supply Intakes.** No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.

8. **Adverse Effects From Impoundments.** If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.

9. **Management of Water Flows.** To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization and storm water management activities, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).

10. **Fills Within 100-Year Floodplains.** The activity must comply with applicable FEMA-approved state or local floodplain management requirements.

11. **Equipment.** Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance.

12. **Soil Erosion and Sediment Controls.** Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow.

13. **Removal of Temporary Fills.** Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate.

14. **Proper Maintenance.** Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety.

15. **Wild and Scenic Rivers.** No activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a “study river” for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency in the area (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service).

16. **Tribal Rights.** No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

17. **Endangered Species.** (a) No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which “may affect” a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed.

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements.

(c) Non-federal permittees shall notify the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the

endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. The district engineer will determine whether the proposed activity "may affect" or will have "no effect" to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination within 45 days of receipt of a complete pre-construction notification. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the project, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have "no effect" on listed species or critical habitat, or until Section 7 consultation has been completed.

(d) As a result of formal or informal consultation with the FWS or NMFS the district engineer may add species-specific regional endangered species conditions to the NWP.

(e) Authorization of an activity by a NWP does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the U.S. FWS or the NMFS, both lethal and non-lethal "takes" of protected species are in violation of the ESA. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. FWS and NMFS or their world wide Web pages at <http://www.fws.gov/> and <http://www.noaa.gov/fisheries.html> respectively.

18. Historic Properties. (a) In cases where the district engineer determines that the activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of Section 106 of the National Historic Preservation Act. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the authorized activity may have the potential to cause effects to any historic properties listed, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties may be affected by the proposed work or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of or potential for the presence of historic resources can be sought from the State Historic Preservation Officer or Tribal Historic Preservation Officer, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted and these efforts, the district engineer shall determine whether the proposed activity has the potential to cause an effect on the historic properties. Where the non-Federal applicant has identified historic properties which the activity may have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects or that consultation under Section 106 of the NHPA has been completed.

(d) The district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA Section 106 consultation is required. Section 106 consultation is not required when the Corps determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). If NHPA section 106 consultation is required and will occur, the district engineer will notify the non-Federal applicant that he or she cannot begin work until Section 106 consultation is completed.

(e) Prospective permittees should be aware that section 110k of the NHPA (16 U.S.C. 470h-2(k)) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of Section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, explaining the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

19. Designated Critical Resource Waters. Critical resource waters include, NOAA-designated marine sanctuaries, National Estuarine Research Reserves, state natural heritage sites, and outstanding national resource waters or other waters officially designated by a state as having particular environmental or ecological significance and identified by the district engineer after notice and opportunity for public comment. The district engineer may also designate additional critical resource waters after notice and opportunity for comment.

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWP 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, and 50 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with general condition 27, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

20. Mitigation. The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that adverse effects on the aquatic environment are minimal:

(a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating) will be required to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10 acre and require pre-construction notification, unless the district engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-specific waiver of this requirement. For wetland losses of 1/10 acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in minimal adverse effects on the aquatic environment. Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, wetland restoration should be the first compensatory mitigation option considered.

(d) For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation, such as stream restoration, to ensure that the activity results in minimal adverse effects on the aquatic environment.

(e) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWP. For example, if an NWP has an acreage limit of 1/2 acre, it cannot be used to authorize any project resulting in the loss of greater than 1/2 acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that a project already meeting the established acreage limits also satisfies the minimal impact requirement associated with the NWPs.

(f) Compensatory mitigation plans for projects in or near streams or other open waters will normally include a requirement for the establishment, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, riparian areas may be the only compensatory mitigation required. Riparian areas should consist of native species. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(g) Permittees may propose the use of mitigation banks, in-lieu fee arrangements or separate activity-specific compensatory mitigation. In all cases, the mitigation provisions will specify the party responsible for accomplishing and/or complying with the mitigation plan.

(h) Where certain functions and services of waters of the United States are permanently adversely affected, such as the conversion of a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse effects of the project to the minimal level.

21. **Water Quality**. Where States and authorized Tribes, or EPA where applicable, have not previously certified compliance of an NWP with CWA Section 401, individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 330.4(c)). The district engineer or State or Tribe may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

22. **Coastal Zone Management.** In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). The district engineer or a State may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

23. **Regional and Case-By-Case Conditions.** The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

24. **Use of Multiple Nationwide Permits.** The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal water is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/3-acre.

25. **Transfer of Nationwide Permit Verifications.** If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

“When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.”

(Transferee)

(Date)

26. **Compliance Certification.** Each permittee who received an NWP verification from the Corps must submit a signed certification regarding the completed work and any required mitigation. The certification form must be forwarded by the Corps with the NWP verification letter and will include:

(a) A statement that the authorized work was done in accordance with the NWP authorization, including any general or specific conditions;

(b) A statement that any required mitigation was completed in accordance with the permit conditions; and

(c) The signature of the permittee certifying the completion of the work and mitigation.

27. Pre-Construction Notification. (a) Timing. Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, as a general rule, will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity until either:

(1) He or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or

(2) Forty-five calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 17 that listed species or critical habitat might be affected or in the vicinity of the project, or to notify the Corps pursuant to general condition 18 that the activity may have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that is "no effect" on listed species or "no potential to cause effects" on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or Section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)) is completed. Also, work cannot begin under NWPs 21, 49, or 50 until the permittee has received written approval from the Corps. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee cannot begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) Contents of Pre-Construction Notification: The PCN must be in writing and include the following information:

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed project;

(3) A description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity. The description should be sufficiently detailed to allow the district engineer to determine that the adverse effects of the project will be minimal and to determine the need for compensatory mitigation. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the project and when provided result in a quicker decision.);

(4) The PCN must include a delineation of special aquatic sites and other waters of the United States on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters of the United States, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many waters of the United States.

Furthermore, the 45 day period will not start until the delineation has been submitted to or completed by the Corps, where appropriate;

(5) If the proposed activity will result in the loss of greater than 1/10 acre of wetlands and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(6) If any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, for non-Federal applicants the PCN must include the name(s) of those endangered or threatened species that might be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work. Federal applicants must provide documentation demonstrating compliance with the Endangered Species Act; and

(7) For an activity that may affect a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, for non-Federal applicants the PCN must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property. Federal applicants must provide documentation demonstrating compliance with Section 106 of the National Historic Preservation Act.

(c) Form of Pre-Construction Notification: The standard individual permit application form (Form ENG 4345) may be used, but the completed application form must clearly indicate that it is a PCN and must include all of the information required in paragraphs (b)(1) through (7) of this general condition. A letter containing the required information may also be used.

(d) Agency Coordination: (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWP and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

(2) For all NWP 48 activities requiring pre-construction notification and for other NWP activities requiring pre-construction notification to the district engineer that result in the loss of greater than 1/2-acre of waters of the United States, the district engineer will immediately provide (e.g., via facsimile transmission, overnight mail, or other expeditious manner) a copy of the PCN to the appropriate Federal or state offices (U.S. FWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Office (THPO), and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will then have 10 calendar days from the date the material is transmitted to telephone or fax the district engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(3) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by Section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

(4) Applicants are encouraged to provide the Corps multiple copies of pre-construction notifications to expedite agency coordination.

(5) For NWP 48 activities that require reporting, the district engineer will provide a copy of each report within 10 calendar days of receipt to the appropriate regional office of the NMFS.

(e) District Engineer's Decision: In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If the proposed activity requires a PCN and will result in a loss of greater than 1/10 acre of wetlands, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for projects with smaller impacts. The district engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed work are minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, after considering mitigation, the district engineer will notify the permittee and include any conditions the district engineer deems necessary. The district engineer must approve any compensatory mitigation proposal before the permittee commences work. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the district engineer to be minimal, the district engineer will provide a timely written response to the applicant. The response will state that the project can proceed under the terms and conditions of the NWP.

If the district engineer determines that the adverse effects of the proposed work are more than minimal, then the district engineer will notify the applicant either: (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (2) that the project is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse effects occur to the aquatic environment, the activity will be authorized within the 45-day PCN period. The authorization will include the necessary conceptual or specific mitigation or a requirement that the applicant submit a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level. When mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan.

28. Single and Complete Project. The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

D. Further Information

1. District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP.
2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.
3. NWPs do not grant any property rights or exclusive privileges.
4. NWPs do not authorize any injury to the property or rights of others.
5. NWPs do not authorize interference with any existing or proposed Federal project.

E. Definitions

Best management practices (BMPs): Policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural.

Compensatory mitigation: The restoration, establishment (creation), enhancement, or preservation of aquatic resources for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Currently serviceable: Useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

Discharge: The term “discharge” means any discharge of dredged or fill material.

Enhancement: The manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

Ephemeral stream: An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

Establishment (creation): The manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area.

Historic Property: Any prehistoric or historic district, site (including archaeological site), building, structure, or other object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria (36 CFR part 60).

Independent utility: A test to determine what constitutes a single and complete project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a

project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

Intermittent stream: An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

Loss of waters of the United States: Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. The loss of stream bed includes the linear feet of stream bed that is filled or excavated. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities eligible for exemptions under Section 404(f) of the Clean Water Act are not considered when calculating the loss of waters of the United States.

Non-tidal wetland: A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(b). Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (i.e., spring high tide line).

Open water: For purposes of the NWPs, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of standing or flowing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of "open waters" include rivers, streams, lakes, and ponds.

Ordinary High Water Mark: An ordinary high water mark is a line on the shore established by the fluctuations of water and indicated by physical characteristics, or by other appropriate means that consider the characteristics of the surrounding areas (see 33 CFR 328.3(e)).

Perennial stream: A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

Practicable: Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Pre-construction notification: A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

Preservation: The removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

Re-establishment: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area.

Rehabilitation: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

Restoration: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.

Riffle and pool complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a coarse substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

Riparian areas: Riparian areas are lands adjacent to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects waterbodies with their adjacent uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 20.)

Shellfish seeding: The placement of shellfish seed and/or suitable substrate to increase shellfish production. Shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or shell fragments (i.e., spat on shell). Suitable substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.

Single and complete project: The term "single and complete project" is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete project must have independent utility (see definition). For linear projects, a "single and complete project" is all crossings of a single water of the United States (i.e., a single waterbody) at a specific location. For linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

Stormwater management: Stormwater management is the mechanism for controlling

stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

Stormwater management facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and best management practices, which retain water for a period of time to control runoff and/or improve the quality (i.e., by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

Stream bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

Stream channelization: The manipulation of a stream's course, condition, capacity, or location that causes more than minimal interruption of normal stream processes. A channelized stream remains a water of the United States.

Structure: An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

Tidal wetland: A tidal wetland is a wetland (i.e., water of the United States) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(b) and 33 CFR 328.3(f), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line, which is defined at 33 CFR 328.3(d).

Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: For purposes of the NWP, a waterbody is a jurisdictional water of the United States that, during a year with normal patterns of precipitation, has water flowing or standing above ground to the extent that an ordinary high water mark (OHWM) or other indicators of jurisdiction can be determined, as well as any wetland area (see 33 CFR 328.3(b)). If a jurisdictional wetland is adjacent--meaning bordering, contiguous, or neighboring--to a jurisdictional waterbody displaying an OHWM or other indicators of jurisdiction, that waterbody and its adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)). Examples of "waterbodies" include streams, rivers, lakes, ponds, and wetlands.

F. Regional General Conditions

Regional General Condition 1

Full Agency Pre-construction Notification: In an effort to expedite full agency permit review it is requested that all pre-construction notifications (PCNs) submitted for activities subject to Nationwide Permits 21, 49, and 50, and for those activities resulting in the loss of greater than ½

acre of waters of the U.S., include one original hard copy and five (5) additional copies of the PCN package. Applicants are encouraged to submit the five agency copies in electronic format as CDs, in order to minimize the use of paper and postage resources.

Regional General Condition 2

Pre-Construction Notification Submittals: In addition to the PCN requirements listed in Nationwide Permit General Condition 27, all PCNs should include the following information:

- Graphic illustrations on 8 1/2" x 11" paper. The illustrations must clearly depict the project boundaries, including all elements and phases of the proposed project. Three types of illustrations are needed to properly depict the work to be undertaken. These illustrations or drawings are identified as a Vicinity Map {a location map such as the U.S. Geological Survey (USGS) 7.5 Minute Series topographical map is highly encouraged}, a Plan View and a Typical Cross-Section Map. Each illustration should identify the project, the applicant, and the type of illustration (vicinity map, plan view or cross-section). In addition, each illustration should be identified with a figure or attachment number and the project Latitude and Longitude.
- A written description of the proposed project including acreage(s) of waters of the U.S. (according to aquatic resource type) proposed to be directly or indirectly affected as a result of the proposed project, the linear footage of proposed direct and indirect stream impacts associated with the project, and cubic yards of fill proposed to be discharged.
- A description of the ways in which the project has been designed to avoid and minimize adverse impacts to waters of the U.S.
- Information concerning whether the proposed activity would affect any historic properties listed, determined to be eligible, or which they have reason to believe may be eligible, for listing on the National Register of Historic Places.
- Basic information about the general project area (encompassing a search radius of 2 miles centered on the project area) including USGS 7.5' series topographic maps, National Register of Historic Places (NRHP) files including Historic Districts, and county atlases, histories and/or any historic USGS 15' series topographic map(s), brief description of the terrain and topography of the project area, acreage of the project area, proximity of the project area to major waterways, past land uses in the project area, and any past cultural resources studies or coordination for the project area, if available, along with photographs, keyed to mapping, showing the project area and any buildings or structures on adjacent parcels.
- The submittal of ground photographs to illustrate current conditions of the overall project site and impact site is highly encouraged.

Regional General Condition 3

Compensatory Mitigation: Compensatory Mitigation will typically be required as indicated in accordance the terms and conditions of the NWP's in addition to all General and Regional Conditions for projects with impacts that result in the conversion of a water of the U.S. to uplands or the conversion of one aquatic resource type to another.

Regional General Condition 4

Passage of Aquatic Life: The inlet/outlets to culverts must be designed in such a manner to maintain substrate in the bottom of the culvert. Countersinking the culvert to the sub-pavement of the streambed or the use of bottomless culverts will generally fulfill this requirement (culverts installed in bedrock streams do not need to be countersunk). Culverted crossings should be sized in a manner that allow the passage of aquatic life and freely pass bankfull flows. The only exception to this requirement would involve culvert placement in bedrock and/or extremely high gradient streams, in which countersinking of culverts is not practicable. In the event proposed crossings do not meet these criteria compensatory mitigation may be required.

Regional General Condition 5

Endangered Species: Federally listed endangered species, subject to Section 7 of the Endangered Species Act occur in nearly every county within West Virginia. As part of the PCN process, the District Engineer will assume responsibility for determining project-related effects to endangered species. For projects that do not require a PCN, it is the applicant's responsibility to ensure that all elements of a proposed single and complete project comply with Section 7 of the Endangered Species Act.

Regional General Condition 6

Endangered Species Habitat: Due to the potential presence of endangered species or their habitats, notification is required to the U.S. Fish and Wildlife Service Elkins Field Office, 694 Beverly Pike, Elkins, West Virginia 26241, for any work in the following waterways:

Huntington District Waterways:

- Kanawha River (Kanawha Falls Wheeler Islands, River Mile 75.5) Fayette and Kanawha Counties (Tubercled-blossum pearlymussel, *Epioblasma torulosa*; Pink mucket pearlymussel, *Lampsilis abrupta*; and Fanshell, *Cyprogenia stegaria*)
- Potts Creek, Monroe County
(James spinymussel, *Pleurobema collina*)
- South Fork Potts Creek, Monroe County
(James spinymussel, *Pleurobema collina*)

- Elk River (Sutton Dam to slackwater below Coonskin Park) Braxton, Clay and Kanawha Counties (Clubshell, *Pleurobema clava*, Pink mucket pearlymussel, *Lampsilis abrupta*; and Northern riffleshell, *Epioblasma torulosa rangiana*)
- Meathouse Fork Middle Island Creek, Doddridge County (Clubshell, *Pleurobema clava*)
- Middle Island Creek, Doddridge, Tyler and Pleasants Counties (Clubshell, *Pleurobema clava*)
- Ohio River (Upper Greenup, R.C. Byrd, Racine, and Bellville Navigation Pools) Cabell, Mason, Jackson and Wood Counties (Pink mucket pearlymussel, *Lampsilis abrupta*; and Fanshell, *Cyprogenia stegaria*)
- Lower Gauley River (Summersville to Swiss), Nicholas and Fayette Counties (Virginia spiraea, *Spiraea virginiana*)
- Bluestone River (Bluestone Gorge to slackwater Bluestone Reservoir) Mercer and Summers Counties (Virginia spiraea, *Spiraea virginiana*)
- Greenbrier River, Pocahontas and Greenbrier Counties (Virginia spiraea, *Spiraea virginiana*)
- Lower Meadow River (Nallen to Gauley River) Nicholas and Fayette Counties (Virginia spiraea, *Spiraea virginiana*)
- Dingess Branch of Marsh Fork and associated palustrine emergent and scrub-shrub wetlands – Raleigh County (Virginia spiraea, *Spiraea virginiana*)
- Millers Camp Branch of Marsh Fork and associated palustrine emergent scrub-shrub wetlands - Raleigh County (Virginia spiraea, *Spiraea virginiana*)
- South Fork Hughes River – Ritchie County (Clubshell, *Pleurobema clava*)

Pittsburgh District Waterways:

- Sleepy Creek, and associated riverine emergent wetland habitat, Morgan County (Harperella, *Ptilimnium nodosum*)
- Great Cacapon River and associated riverine emergent wetland habitat, Morgan County (Harperella, *Ptilimnium nodosum*)
- Back Creek and associated riverine emergent wetland habitat Berkeley County (Harperella, *Ptilimnium nodosum*)

- Hackers Creek of West Fork River, Lewis County
(Clubshell, *Pleurobema clava*)
- Wetlands Hardy and Berkeley Counties
Northeastern bulrush, *Scirpus ancistrochaetus*)
- Evitts Run watershed, Jefferson County
(Madison cave isopod, *Antrolana lira*)
- Rippon and Leetown areas near sinkholes spring seeps, or other groundwater/surface water interfaces, Jefferson County (Madison cave isopod, *Antrolana lira*)

Regional General Condition 7

Critical Resource Waters: All PCNs involving work in Critical Resource waters require notification to the National Park Service and/or the Forest Service.

Critical Resource Waters:

- New River;
- Bluestone River from the upstream boundary of Pipestem Park to Bluestone Reservoir;
- Meadow River from an area near the US 19 Bridge to its junction with the Gauley River;
- All streams within the Monongahela National Forest designated as National Wild and Scenic Study Rivers;
- All streams and other bodies of water in State and National Forests and Recreation Areas (included are streams and bodies of water located within the Spruce Knob, Seneca Rocks and Gauley River National Recreation Areas); and
- Streams and their tributaries as contained within the boundaries of the designated National Wilderness Areas or the headwaters of such rivers and their tributaries; Cranberry River, Red Creek, Laurel Fork and Otter Creek.

Regional General Condition 8

West Virginia Natural Stream Preservation Act: In accordance with the West Virginia Natural Stream Preservation Act, the following streams or rivers are protected from activities that would impound, divert or flood the body of water:

West Virginia Natural Stream Preservation Act

- Greenbrier River from its confluence with Knapps Creek to its confluence with the New River;

- **Anthony Creek from its headwaters to its confluence with the Greenbrier River;**
- **Cranberry River from its headwaters to its confluence with the Gauley River;**
- **Birch River from Cora Brown Bridge in Nicholas County to its confluence with the Elk River; and**
- **New River from its confluence with the Greenbrier River to its confluence with the Gauley River.**

Regional General Condition 9

Waters of Special Concerns: All PCNs involving work in Waters of Special Concern, shall include prior written notification to the West Virginia Department of Environmental Protection, Division of Water Resources. Waters of Special Concern include, but are not limited to, naturally reproducing trout streams, federally designated rivers subject to the Wild and Scenic Rivers Act, U.S.C. Subsection 1271 et. seq., including all study rivers, waters located within the boundaries of state parks, state forests, National Parks, National Forests, waters designated under the National Parks and Recreation Act of 1978, and waters with unique or exceptional aesthetic, ecological, or recreational value. For specific information on trout streams, applicants may contact the West Virginia Division of Natural Resources, Wildlife Resource Section, Trout Fisheries Program at 304-637-0245.

Regional General Condition 10

Cultural Resources: Cultural resources, including historic and prehistoric sites, buildings, districts, and objects significant in American history, architecture, archeology, engineering and culture, listed in or eligible for listing in the National Register of Historic Places (NRHP), are present throughout the State of West Virginia. As part of the PCN process, the District Engineer will assume responsibility for determining project-related effects to cultural resources subject to the provisions of Section 106 of the National Historic Preservation Act (NHPA). For projects that do not require a PCN, it is the applicant's responsibility to ensure that all elements of a proposed single and complete project comply with Section 106 of the National Historic Preservation Act.

Regional General Condition 11

Archeological Sites and Human Remains: In the event any archeological sites or human remains are uncovered during construction, the permittee shall cease all work immediately and contact the appropriate Corps District office, the West Virginia Division of Culture and History at 304-558-0240 and the appropriate county Sheriff's Office.

Regional General Condition 12

Fills in the 100-Year Floodplain: All PCNs involving fills in the 100-year floodplain shall include a certified receipt and copy of the cover letter requesting the approval letter or floodplain

permit from the appropriate Floodplain Manager/Coordinator. This Regional General Condition would apply to all PCNs involving any type of work within the 100-year floodplain.

G. West Virginia State 401 Water Quality Certification Conditions for Nationwide Permits

The following are West Virginia's Section 401 Water Quality Certification standard and special conditions that apply to the Nationwide Permits 1-20 and 22-48 as published on March 12, 2007 in Part II of the *Federal Register* (72FR 11092), by the U.S. Army Corps of Engineers. These conditions must be implemented into any activity authorized by a U.S. Army Corps of Engineers Nationwide Permit(s). The State's certification of these Nationwide Permit activities does not replace the need for the applicant proposing an activity under the Nationwide Permit Program from obtaining other applicable permits/authorizations from the West Virginia Department of Environmental Protection and/or the Division of Natural Resources. Each permittee shall, if they do not understand or are not aware of applicable Nationwide Permit conditions, contact the Corps of Engineers prior to conducting any activity authorized by a Nationwide Permit in order to be advised of applicable conditions. These 401 Water Quality Certifications, with all attendant standard conditions and special conditions, are applicable to Corps of Engineers Civil Works Projects in West Virginia.

1. The permittee will investigate for the presence of water supply intakes or other activities within 1/2 mile downstream, which may be affected by suspended solids and turbidity increases caused by work in the watercourse. The permittee will give notice to operators of any such water supply intakes and such other water quality dependent activities as necessary before beginning work in the watercourse in sufficient time to allow preparation for any change in water quality.
2. Excavation, dredging or filling in the watercourse will be done only to the extent necessary to achieve the project's purpose.
3. Spoil materials from the watercourse or onshore operations, including sludge deposits, will not be dumped in the watercourse, or deposited in wetlands or other areas where the deposit may adversely affect the surface or ground waters of the state.
4. The permittee will employ measures to prevent or control spills from fuels, lubricants or any other materials used in connection with construction and restrict them from entering the watercourse. Storage areas for chemicals, explosives, lubricants, equipment fuels, etc., as well as equipment refueling areas, must include containment measures (e.g., liner systems, dikes, etc.) to ensure that spillage of any material will not contact surface or ground waters. Storage areas and refueling areas shall be a minimum distance of 100 feet from any surface water body. Storage and refueling areas must be located outside the West Virginia Division of Health's established wellhead protection zone when domestic water supply wells are present. All spills shall be promptly reported to the State Center for Pollution, Toxic Chemical and Oil Spills, 1-800-642-3074.
5. Upon completion of earthwork operations, all fills in the watercourse or onshore and all other areas onshore disturbed during construction will be properly stabilized to prevent

soil erosion. Where possible, stabilization shall incorporate revegetation using bioengineering as an alternative to rip rap. If rip rap is utilized, it is to be of such weight and size that bank stress or slump conditions will not be created due to its placement. Fill is to be clean, nonhazardous and of such composition that it will not adversely affect the biological, chemical or physical properties of the receiving waters. To reduce potential slope failure and/or erosion behind the material, fill containing concrete must be of such weight and size that promotes stability during expected high flows. Loose large slab placement of concrete sections from demolition projects greater than thirty-six inches in its longest dimension and tires are prohibited. Rebar or wire in concrete should not extend further than one (1) inch. All activities require the use of clean and coarse non erodible materials with 15% or less fines, that is properly sized to withstand expected high flows.

6. Runoff from any storage areas or spills will not be allowed to enter storm sewers without acceptable removal of solids, oils and toxic compounds. Discharges from retention/detention ponds must comply with permit requirements of the National Pollutant Discharge Elimination System permit program of the West Virginia Department of Environmental Protection, Division of Water and Waste Management.
7. Land disturbances, which are integral to the completion of the permitted activity and are one (1) acre or greater in total area, must comply with the National Pollutant Discharge Elimination System stormwater permit requirements as established by the West Virginia Department of Environmental Protection, Division of Water and Waste Management. Best Management Practices for Sediment and Erosion Control, as described in the West Virginia Department of Environmental Protections Erosion and Sediment Control Best Management Practice Manual, 2006, or similar documents prepared by the West Virginia Division of Highways, U.S. Department of Agriculture, Natural Resource Conservation Service (NRCS), or West Virginia Department of Environmental Protection's, Division of Mines and Reclamation may be used. These handbooks are available from the respective agency offices.
8. Green concrete will not be permitted to enter the watercourse unless contained by tightly sealed forms or cells. Concrete handling equipment shall not discharge waste washwater into wetlands or watercourses at any time without adequate wastewater treatment as approved by the West Virginia Department of Environmental Protection, Division of Water and Waste Management.
9. In stream work in warm water fishery streams and their adjacent tributaries during the fish spawning season, April - June and trout waters and their adjacent tributaries during the trout water fish spawning season September 15-February 28 requires a spawning season waiver from the West Virginia Division of Natural Resources, Wildlife Resources Section. For information about specific streams contact Wildlife Resources Section, Trout Fisheries Program at 304-637-0245 or Warm Water fisheries Program 304-558-2771. In stream work may occur during the respected spawning season in waters not considered fisheries without a waiver if all reasonable measures are taken to minimize

turbidity and sedimentation downstream associated with the proposed project and the in-stream work is less than 1 day in duration.

10. Removal of mature riparian vegetation not directly associated with the project construction is prohibited. Disturbance and removal of vegetation from project construction area is to be avoided, where possible, and minimized when necessary. Removal of vegetation shall not be allowed where stream bank stability under normal flow conditions would be compromised.
11. Operation of equipment instream is to be minimized and accomplished during low flow periods when practical. Ingress and egress for equipment shall be within the work site. Location of ingress and egress outside the immediate work area requires prior approval of the West Virginia Department of Environmental Protection, Division of Water and Waste Management in concurrence with the West Virginia Division of Natural Resources.
12. The permittee will comply with water quality standards as contained in the West Virginia Code of State Regulations, Requirements Governing Water Quality Standards, Title 47, Series 2.
13. Stream activities permitted under the Nationwide Permit Program require that a West Virginia Public Lands Corporation Right of Entry be obtained. Application for this authorization should be made to the West Virginia Division of Natural Resources, Office of Real Estate Management, Capitol Complex, Building 3, Room 643, Charleston, West Virginia 25305. Any activity within the 100-year floodplain requires approval from the appropriate Floodplain Manager. The following website provides a statewide listing of Floodplain Managers in West Virginia: www.wvdhsem.gov/fplain_mgt1.htm.
14. The deposit of dredged or fill materials in island backchannels, embayments or stream mouths is not certified for any of the Nationwide Permits. Stream mouth is defined as the area extending 100 feet upstream and 100 feet downstream on receiving streams that are classified as a Section 10 stream.
15. This Standard Condition requires an Individual State Water Quality Certification for Nationwide Permits; 7, 29, 33, 39, 45, and 48 for work in any of the rivers or streams listed in Sections A through D below. Prior written notification to the West Virginia Department of Environmental Protection, Division of Water and Waste Management, is required for use of Nationwide Permits 6, 12, 13, 14, 16, 17, 18, 19, 27, 40, 41, and 42 in any of the streams listed in Sections A through D as follows, except as may be provided for in the individual nationwide permit:

A. 'Waters of Special Concern' – includes all of those waters listed in Appendix A of 60 CSR 5, Waters of Special Concern, including but not limited to, naturally reproducing trout streams, federally designated rivers under the Wild and Scenic Rivers Act, Public law 95-542, as amended, 16 U.S.C. §§ 1271 et. seq. (Bluestone River from the upstream boundary of Pipestem State Park to Bluestone Reservoir, Meadow River from near the US 19 bridge to its junction

with the Gauley River, also included are all rivers within the Monongahela National Forest designated as National Wild and Scenic Study Rivers), waters in state parks and forests, waters in National Parks and Forests, waters designated under the National Parks and Recreation Act of 1978, and waters with unique or exceptional aesthetic, ecological, or recreational value.

B. All naturally reproducing trout streams in the following counties; Barbour, Fayette, Grant, Greenbrier, Hampshire, Hardy, Mercer, Mineral, Monroe, Nicholas, Pendleton, Pocahontas, Preston, Raleigh, Randolph, Summers, Tucker, Upshur and Webster. For information about specific streams contact Wildlife Resource Section, Trout Fisheries Program at 304-637-0245;

C. 'Outstanding National Resource Waters' - In all cases, waters that constitute an Outstanding National Resource shall be maintained and protected as necessary; included are the following rivers and their tributaries as contained within the boundaries of the designated National Wilderness Areas or the headwaters of such rivers and their tributaries; Cranberry River, Red Creek, Laurel Fork, and Otter Creek. West Virginia Code of State Regulations, Requirements Governing Water Quality Standards, Title 47, Series 2.

D. 'West Virginia Natural Stream Preservation Act' - The following streams or rivers are protected from activities that would impound, divert or flood the body of water: Greenbrier River from its confluence with Knapps Creek to its confluence with the New River, Anthony Creek from its headwaters to its confluence with the Greenbrier River, Cranberry River from its headwaters to its confluence with the Gauley River, Birch River from Cora Brown Bridge in Nicholas County to the confluence of the river with the Elk River, and New River from its confluence with the Greenbrier River to its confluence with the Gauley River.

16. Wetland and Stream Mitigation guidelines - The discharge of fill material into a stream or wetland is authorized based upon the following criteria:

1. One-tenth to ½ acre of wetland impact requires a Pre-Construction Notice (PCN) and plan for mitigation to be submitted to the Corps of Engineers along with the proposed plan for mitigation provided to the state for approval.
2. The amount of fill in a wetland, wetland complex or wetland system without mitigation is not to cumulatively exceed 1/10 acre.

In all instances, mitigation for all impacts incurred through use of these Nationwide Permits must first be directed to elimination of the impacts, then minimization of the impacts and lastly through replacement of in-kind within the major watershed in which the impact occurs. However, the use of mitigation banks for in-kind replacement is not restricted to the major watershed in which the impact has occurred until such time as mitigation banks are developed in each major watershed. The use of the In-Lieu Fee

program is authorized for compensatory mitigation when all other compensatory mitigation options have been exhausted.

When in-kind, replacement mitigation is used it is to be accomplished at the following ratios:

Impacts to open water wetlands are to be one (1) acre replaced for one (1) acre impacted.

Impacts to wet meadow wetlands are to be two (2) acres replaced for one (1) acre impacted.

Impacts to scrub-shrub and forested wetlands are to be three (3) acres replaced for one (1) acre impacted.

In instances where compensatory in-kind mitigation is completed 12 months prior to the impact of the resource, the replacement ratio will be one (1) acre created to every one (1) acre impacted.

NOTE: The ratio of created wetlands to impacted wetlands not only insure no net loss, but assure the adequate replacement of the impacted wetlands functions and values at the level existing prior to the impact. For many of the more complicated type wetlands, such as scrub-shrub and forested, the values and functions cannot readily be replaced through creation. Furthermore, not all wetland creation is successful.

In certain instances, the West Virginia Department of Environmental Protection, Division of Water and Waste Management may consider the acquisition of existing wetlands. Acquisition ratios are the following:

5 to1 for open water wetlands;

10 to1 for wet meadow wetlands and

15 to1 for scrub-shrub and forested wetlands.

All wetlands acquired, using the acquisition method of mitigation, will either be deeded to the West Virginia Division of Natural Resources' Public Land Corporation for management by the Wildlife Resources Section or placed under a conservation easement and be protected from disturbance by the permittee or their designee.

In certain instances, the West Virginia Department of Environmental Protection, Division of Water and Waste Management may consider enhancement of existing wetlands. Mitigation ratios for enhanced wetlands will be decided on a case-by-case basis. Enhanced wetlands will either be deeded to the West Virginia Division of Natural Resources' Public Land Corporation for management by the Wildlife Resources Section or placed under a conservation easement and be protected from disturbance by the permittee or their designee.

Streams. Compensatory mitigation projects for stream impacts should attempt to replace stream functions. Acceptable functional assessments can be used to assess impacts and ecological lift from a proposed project. Mitigation ratios will be determined on a case-by-case basis based on the pre and post condition stream quality and complexity of the mitigation project. Riparian zones used for compensatory mitigation purposes may require protection through deed restrictions or conservation easements by the permittee or their designee.

17. Streams with Mussel populations.

A. Should native freshwater mussels be encountered during the use of any Nationwide Permit, all activity is to cease immediately and the Wildlife Resources Section, Wildlife Diversity Program is to be contacted (304-637-0245) to determine significance of the mussel population and the action to be taken.

B. The following list of streams are known to have mussel populations, which are established as a protected "no take" species by the state. Applicants wishing to conduct projects in these streams are strongly encouraged to contact the Wildlife Resources Section, Wildlife Diversity Program with a detailed project description and an accurate project location. For further information please contact the Wildlife Resources Section, Wildlife Diversity program at 304-637-0245.

HUNTINGTON DISTRICT

- James River Drainage
 - South Fork of Potts Creek
- Kanawha River Drainage
 - Pocatalico River
 - Kanawha River above Charleston
 - Coal River
 - Elk River (downstream of Webster Springs)
 - Big Sandy Creek
- New River
 - Bluestone River
 - Greenbrier River
 - Indian Creek
- Little Kanawha River Drainage
 - Little Kanawha River
 - Hughes River
 - North and South Fork of Hughes River
 - Steer Creek
 - Cedar Creek
 - Leading Creek
 - Reedy Creek
 - Spring Creek

Spruce Creek
Henry's Fork
Goose Creek
Middle Island Creek Drainage
Middle Island Creek
Meathouse Fork (below Indian Fork)
Buckeye Creek
Mud River Drainage
Mud River
Middle Fork
Trace Fork
Ohio Direct Drainage
Twelvepole Creek
Beech Fork
Tug Fork River (up stream of Kermit, WV)
Mill Creek (Jackson County)
Hurricane Creek

PITTSBURGH DISTRICT

Ohio River Direct Drainage
Wheeling Creek
Fishing Creek
Fish Creek
Monongahela River Drainage
Dunkard Creek
West Fork River
Hackers Creek of Tygart Valley River
Kincheloe Creek
Potomac River Drainage
Cacapon River (below Wardensville)
North River of Cacapon River
Patterson Creek

18. Isolated Wetlands.

In some cases, the Corps of Engineers may determine that an activity will not impact waters of the United States because the water is an isolated wetland, and therefore does not require a 404 permit. However, under West Virginia State code (§§22-11-3(23)) isolated wetlands are designated waters of the State. Accordingly, any applicant proposing to impact an isolated wetland must contact the West Virginia Department of Environmental Protection, Division of Water and Waste Management to obtain all necessary approvals for activities impacting any isolated wetlands.